REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NUMBER 142 OF 2006

HANNAH NYAWIRA MAINA..... APPELLANT

VERSUS

JEMES KARANJA..... RESPONDENT

(An Appeal from the Judgment of Honourable S.M. Mungai, Principal Magistrate sitting at Nyahururu PM's court in PMCC no. 130 of 2002 and delivered on the 24th Day of August 2006Nakuru delivered on 19th/April 2010 in Nakuru CMCC No. 1586 of 2006)

J U D G M E N T

1. This appeal arises from of the judgment of the trial court delivered in the 24th August 2006 in Nyahururu PMCC No 130 of 2002.

A brief background to the case is that the appellant, a businesslady hiked a lift from the driver of motor vehicle registration number KAG 247, Y a Mitsubishi Canter then being driven by one Stanley Mutahi Wachira from Rumuruti traveling towards Maralal. The vehicle was not a passenger carrier. The appellant paid fare for herself and her bags of potatoes, together with others.

On the way the vehicle was involved in a self involving accident when it lost control and overturned. The appellant was injured. The driver reported the accident at Rumuruti police station and a notice of intention to prosecute him was issued to him. However disappeared and was never arrested.

The appellant then sued the registered owner of the vehicle for compensation for the injuries she sustained due to the negligence of his driver on vicarious status. She failed to in join the driver as a party.

2. In his defence, the respondent denied that the said driver was his employee or agent, and that he had authorised him to carry unauthorised persons therefore denied being vicarious liable for the acts of the driver.

3. Upon hearing of the case, the trial Magistrate made the following findings that failure to join the driver of the vehicle as a co defendant was fatal to the claim, as authority by the owner of the vehicle was denied, and that the appellant by accepting to be ferried on top of the Canter vehicle on top of potatoes, intentionally assumed the risks that may befall her in case of an accident and proceeded to dismiss the case against the respondent with costs.

It is this dismissal that lead to filing of this appeal upon the grounds summarised as hereunder.

1. That the learned trial Magistrate erred in both law and fact in finding that the plaintiffs

suit was fatally defective for failure to enjoin the driver of the accident motor vehicle Registration No. KAG 247Y as a defendant in the case.

2. The learned Magistrate erred in law and fact in failing to find that the respondent was vicariously liable for the negligence of his driver Stanley Mutahi Wachira whereas police investigations indicated that he indeed was the driver of the said motor vehicle.

3. The trial magistrate erred in fact and law in failing to appreciate the doctrine and applicability of vicarious liability and thereby dismissed the case.

4. The trial Magistrate erred in law and fact in disregarding the evidence, submissions and authorities tendered by the appellant thus arrived at a wrong decision.

4. The appellant tendered evidence that she requested, and the lorry driver accepted to give her a lift with her bags of potatoes from Rumuruti towards Maralal. She paid Kshs.60 including Kshs.10 for the luggage. She stated that she knew the driver as she had used the vehicle several times, all the time being driven by the said driver and gave his name as Stanly Mutahi Wachira.

The driver of the vehicle disappeared and could not be arrested for prosecution.

It was her testimony that the vehicle used to carry goods and passengers at the same time within the said area.

5. On cross examination, she stated that if the vehicle swerved, one would not have been thrown out since it was not fully covered with potatoes and that when it overturned, she supported herself by holding on to the rail that cut off her right hand fingers. She blamed the driver for over speeding and failure to control the same.

6. In his defence the Respondent and owner of the Canter lorry denied that the driver named Stanley Mutahi Wachira and who apparently reported the accident at the police station was his authorised driver, and stated that his authorised driver was one Francis Njuguna, and that the vehicle was insured to carry goods only and not passengers, that he had not given any instructions for carriage of passengers. He denied that Stanley Wachira was his employed driver and denied ever knowing Stanley Mutahi.

7.The issues that arise from the evidence before the trial court are four fold:

1. Whether non jointer of the driver of the accident motor vehicle makes the suit fatally defective.

2. Whether the driver of the accident motor vehicle at the material time, Stanley Mutahi\ Wachira was the agent servant or authorised driver of the registered owner, the respondent.

3. Whether the Respondent is vicariously liable for the negligence of the driver of the motor vehicle and thus liable in damages for negligence.

4. Quantum of damages.

This court being the first appellate court is enjoined to reevaluate and reconsider evidence tendered before the trial court and come up with its own finding and conclusions. Selle & Another vs Associated Motor Boat Co. Ltd & Others (1968) EA 123.

8. I have considered the evidence submissions and the trial court's decision.

The following issues are not in dispute. That the accident indeed took place, that the driver of the vehicle at the material time was one Stanley Mutahi Wachira, that the appellant at her request and upon the driver's acceptance, voluntarily boarded the accident vehicle and paid fare to the driver, that she was injured when the vehicle was involved in a self involving accident, and that the driver was not prosecuted

as he disappeared, and finally that the respondent was the registered owner of the vehicle, Registration No. KAG 247Y Mitsubishi Canter Lorry.

The appeal generally revolves on the issue of vicarious liability and the question whether or not he respondent had authorised the dive at the material time to carry passengers. In trying to interrogate the issues as framed, I shall consider evidence and the law together.

In Selle and Another vs Associated Motor Boat Case (Supra), the driver of the boat was not made a party to the case after it was involved in an accident causing injury to the appellant. The Court of Appeal held that the owner of the boat was vicariously liable for its driver's negligence. So is in the case Mworia vs Kakuzi Ltd (198288) where the owner of the vehicle was also held vicariously liable even when the driver did not testify, a situation similar to the present case.

However, circumstances of each case must be considered individually.

9. In my view considered, the principles to the considered whether always an employer/owner of a vehicle is vicariously liable for negligence of his driver are:

1. Whether the driver was the authorised driver of the owners vehicle.

2. Whether the use of the vehicle was clearly and plainly explained to the authorised driver by the employer.

3. Consequences when a driver commits tortuous acts of negligence within the scope of or during the course of his employment and when tortuous acts are committed by the driver for his own interest and purpose, though within the scope of this employment.

The Respondent denied that the driver at the time of accident was his driver. He however did not call his authorised driver to tell the court how the vehicle was passed over to the driver who caused the accident It was incumbent upon him to seek out both the unauthorised and the authorised drivers to shed light on this. He testified that it appeared to him that his authorised driver Francis Njuguna and Stanley Mutahi were together during the accident but the two escaped, and that he was told the lorry was carrying passengers contrary to his instructions. He did not say what type of instructions he gave, whether there was a notice at the body of the lorry or at the dash board or elsewhere of his instructions. The Respondent did not bother to join the accident driver as a party to the case. The appellant too failed to join the said driver as a codefendant. The Judges held that the failure to join a driver of a motor vehicle was not the fatal to the claim.

In the Selle Case above, the court held the opinion that jointer of the driver was not fatal. Here, the driver of the boat was authorised by the owner as opposed to the present case where the driver is alleged to have not been authorised nor was he an employee of the owner.

In the case Pritoo vs West Nile District Administration 1968 EA 428 it was held;

“where it is proved that a car has caused damage by negligence, then in the absence of evidence to the contrary, a presumption arises that it was driven by a person whose negligence the owner is responsible.”

10. For liability to be attached on the owner, it is necessary to show either that the driver was the owners servant or agent, and that at the material time the driver was acting on the owners behalf as his agent. To establish the existence of the agency relationship, it was necessary to show that the driver was using the vehicle at the owner's request, express or implied or on his instructions and that the tortious acts were done in the performance of the task or duty thereby delegated to him by the owner. Vicarious liability arises when a tortious act is done in the scope of or during the course of employment.

11. The respondent admitted that it appeared that the driver of the vehicle was with his authorised driver

who caused the accident at the material time.

In my opinion it clearly appears that the lorry was being driven at the owners request and instructions and was doing so in performance of the task or duty delegated to the authorised driver by the respondent.

The appellant testified that the subject vehicle used to carry passengers and goods, and that she had used it before. She had paid for the ride to the driver.

There is no doubt that the vehicle was being used for the work the owner had assigned his driver. It is also not in doubt that the driver decided to collect a few coins from carrying passengers together with the owners goals. From the evidence this business of carrying passengers by the driver of the lorry was a flourishing one, and was for the benefit of the driver's interest and purpose, though within the cause of his employment. The acts of carrying the extra goods and the passengers are very closely linked.

In the matter Minister of Police vs Rabie 1986 (1) SA 117 (A) the court held as follows:

"It seems clear that an act done by a servant solely for

his own interest and purposes, although occasioned by his employment, may fall outside the course and scope of his employment and that in deciding whether an act by the servant does so fall, some reference is to be made to the servants intentionif there is sufficiently close link between the servant's acts for his own interests and purposes and the business of his master, the master may yet be liable. This is an objective test. It may be useful to add that a master is liable even for acts which he has not authorised provided that they are so connected with act which he has authorised that they may be regarded as modes – although improper modes of doing them."

12. It is evident that the accident lorry was bing used for carrying the owners goods within the area as the owner testified. The unauthorised act of carrying the appellant in my view, was so done, though not for the benefit of the owner, but within the course of the business that the owner had assigned his driver – as stated in the above quotation, using improper mode

– by having the vehicle driven by a driver not so authorised. I find that the respondent was vicariously liable for the acts and negligence of the driver of his vehicle as the said acts were so closely linked and were committed within the scope of authority and employment.

13. The Respondent in his submissions urged that he had no relationship with the driver of his vehicle at time of the accident, and as he was not an authorised driver or employer and therefore his negligence should not be

visited him. He relied on case Omar Athman vs Garissa County Council NBI HCCC NO 2484 of 1992 (unreport) in support of his proposition and while admitting existence of circumstances when an employer may be so liable as in the case Samuel Gikuru Ndungu vs Coast Bus Co Ltd (2000) e KLR, he nevertheless urged dismissal of the appeal. He further urged that the appellant took the risk of boarding the vehicle knowing well of the risks that may befall her if an accident occurred. As much as she agreed to board an open lorry carrying potatoes, there was no evidence from the respondent that any warning of notice was given to her that the vehicle was not authorised to carry passengers. She indeed paid the fare requested for by the driver. The driver was also under a duty of care to the passengers that the had authorised to board the vehicle. He failed to discharge that duty of care to them.

14. In the Court of Appeal decision in Nakuru C.A No 186 of 2009 (2014) e KLR Tabitha Nduhi Kinyua vs Francis Mburi & Another, the court made observation that there was no notice of warning displayed on any part of the lorry that the driver was expressly forbidden to carry any passengers. No such notice was said to have been brought to the attention of the appellant in this case and the act of the driver charging fare to the passenger was a presumption of authority by the driver for the passengers, and in particular the appellant to board the vehicle. In the circumstances, I do not find that the doctrine of volenti non fit injuria applicable.

15. In its totality, the court finds that the trial court erred in dismissing the appellant's case and comes to the conclusion that the Respondent is variously liable for the negligence of the driver of the accident vehicle on the 19th November 1999, and therefore liable in damages to the appellant for the injuries she sustained.

The upshot of the above is that the appeal filed by the appellant has merit and is hereby allowed. The trial court's judgment is set aside and substituted by a decision that the respondent is vicariously liable in damages to the appellant.

16.The trial Magistrate did not attempt to assess damages for pain and suffering had the appellant's suit succeeded. This is a serious failure by the said Magistrate as parties had quantified the claim. Neithertheless, I shall now attempt to assess the damages.

The appellant sustained injuries and, based on the medical reports tendered in evidence submitted that a sum of Kshs.700,000/= was sufficient compensation. The Respondent on the other hand proposed a sum of Ksh.50,000/=. He reiterated in this appeal that Kshs.50,000/= would still be reasonable.

17. In the Medical Report dated 11th January 2001 and produced by Dr.

Gatembura K.E as exhibit in court, the injuries sustained by the appellant are listed as follows:

- Amputation of right middle finger at the metacarpal phalangeal joint
- Amputation of the right ring finger at the metacarpal – Phalangeal joint
- Disarticulation of the right index finger at the proximal interphalanged joint.

She was admitted for 5 days and complained of loss of use of her right hand with paraesthesia and occasional pain to the stumps.

The doctor testified that four fingers were missing and the appellant had lost use of the right hand. He awarded a 35% permanent incapacitation.

I have considered the authorities tendered by the respondent in support of his proposal of Kshs.700,000/=. In Samson Mutuku Kimwali vs Golden Harvest Mills Ltd. HCCC Mills Ltd HCCC 164 of 2000 (Nbi) the court awarded Kshs.500,000/=. In HCCC No. 1534 of 1997 – Francis Mwangi vs Simon K. Waihwa (1998) e KLR, the court on appeal awarded Kshs.500,000/= for amputation of four fingers in C.A No. 323 of 2010. In the case KPLC vs Nehemiah Wachira (2014) e KLR a sum of Kshs.500,000/= was awarded for similar injuries in March 2014.

Guided by the above authorities, the court shall award to the appellant a sum of Kshs. 500,000/= in general damages for pain and suffering.

Special damages of Kshs.1,500/= were proved. The said sum is allowed. Costs of the appeal shall be borne by the respondent.

Dated, signed and delivered in open court this 14th day of July 2016

JANET MULWA

JUDGE